Supreme Court, U.S.
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No. —

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

MOHAMMED AL-SAFIN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the Ninth Circuit erred in dismissing the appeal in this action on jurisdictional grounds, based on the Ninth Circuit's recent decisions in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (2000) and *Craft v. Campbell Soup. Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam), which held, directly contrary to every other United States Court of Appeals, that the Federal Arbitration Act does not apply to contracts of employment?

2. Whether the Ninth Circuit erred in dismissing the appeal in this action on jurisdictional grounds, based on the Ninth Circuit's recent decisions in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (2000) and *Craft v. Campbell Soup. Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam), which held, contrary to this Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), and the liberal federal policy favoring arbitration agreements, that any agreement to arbitrate between an employer and an employee constitutes an "employment contract" excluded from coverage under the Federal Arbitration Act?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City Group common stock tracks the performance of Circuit City, while CarMax Group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax Group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit entered in this case on August 11, 2000. In the alternative, Circuit City requests summary reversal of the Ninth Circuit's Order.

A related petition for a writ of certiorari recently was granted by this Court in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (2000). Also pending are two related petitions for writs of certiorari in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1379), and *Circuit City Stores, Inc. v. Ingle*, (9th Cir. Jan. 24, 2000) (No. 99-56570), *petition for cert. filed*, 68 U.S.L.W. 3669 (U.S.

May 22, 2000) (No. 99-1648). This case, along with *Adams*, *Ahmed* and *Ingle*, all present similar issues for review; i.e., the proper scope of the Federal Arbitration Act ("FAA") Section One exclusion, and the proper definition for purposes of the FAA Section One exclusion of the term "contracts of employment." 9 U.S.C. § 1 (1994). The primary difference between this case and *Ingle*, as compared to the *Adams* and *Ahmed* cases, lies in their procedural posture. In *Adams* and *Ahmed*, the Ninth Circuit reversed the district courts' grant of separate petitions to compel arbitration, based on its broad reading of the FAA Section One exclusion and broad definition of "contracts of employment." The Ninth Circuit held that the FAA did not apply, as a matter of substantive law, to Circuit City's petitions to compel arbitration, leaving the district courts without authority to compel arbitration. *See Adams*, 194 F.3d at 1071-72; *Ahmed*, 195 F.3d at 1133. In this case, as in *Ingle*, based on its prior ruling in *Adams* that the FAA did not apply, the Ninth Circuit dismissed Circuit City's appeal of a district court decision declining to compel arbitration, finding a lack of appellate jurisdiction. In this case, Circuit City appealed pursuant to 28 U.S.C. § 1291, as well as Section 16 of the FAA, 9 U.S.C. § 16 (1994), which provides independent appellate jurisdiction for immediate appeal from decisions adverse to arbitration. Thus, the same error (an erroneous interpretation of the FAA Section One exclusion) has manifested itself in two different ways in four different cases, all of which deny to Circuit City the substantive rights and procedural mechanisms guaranteed by the FAA.

OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, which order is here sought to be reviewed, is unreported and reprinted here as Appendix C. The Order of the United States District Court for the Western District of

Washington denying Circuit City's motion to compel arbitration is unreported and reprinted here as Appendix A.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on August 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), provides in pertinent part:

> § 1 "[C]ommerce," as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> § 2 A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> § 3 If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the Court in which such suit is pending, upon

being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4 A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .

§ 16 (a) An appeal may be taken from -

(1) an order -

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

9 U.S.C. §§ 1-4, 16 (1994).

STATEMENT OF THE CASE

On June 2, 1997, Respondent Mohammed Al-Safin ("Al-Safin") executed an arbitration agreement as part of his application for employment. (See Ninth Circuit Excerpts of Record ("ER") 11, 16.) Following a period of employment, on December 2, 1999, contrary to the terms of the arbitration agreement, Al-Safin sued Circuit City in the United States District Court for the Western District of Washington, Case No. 99-CV-1953-MJP, pursuant to 28 U.S.C. § 1332(a) (1994 & Supp. III 1997), for a variety of employment-related legal claims. (ER 2.) In response, Circuit City moved to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA"). (ER 48.) On February 24, 2000, the district court entered an Order denying Circuit City's motion to compel arbitration. See Appendix A.

Pursuant to 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(1) (1994), Circuit City appealed the denial of the motion to compel arbitration to the United States Court of Appeals for the Ninth Circuit.[1] (ER 46.) On June 29, 2000, the Ninth Circuit

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[1] Section 16 of the FAA provides a jurisdictional basis for direct appeal to a United States Court of Appeals of orders denying motions to compel arbitration. *See* 9 U.S.C. § 16 (1994). This mechanism permits a party seeking arbitration to obtain immediate appellate review of a decision adverse to arbitration. *Id.* This right to immediate appeal fosters the strong public policy favoring arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (recognizing strong federal policy favoring arbitration).

issued an Order to Show Cause why the appeal should not be dismissed due to a lack of federal appellate jurisdiction. See Appendix B. The Order to Show Cause stated that "because [the Ninth Circuit] has held that such [employment] contracts are not subject to the [FAA], that statute's interlocutory appeal provision does not appear to be applicable here and no other basis for appellate jurisdiction exists. *See Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam) (dismissing appeal on this basis.)." On July 13, 2000, Circuit City responded to the Order to Show Cause. On August 11, 2000, the Ninth Circuit dismissed Circuit City's appeal for lack of jurisdiction. See Appendix C. The Ninth Circuit based this holding on its prior decisions in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam) and *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (2000). *Id.*

As background, in both *Craft* and *Adams*, the Ninth Circuit held, contrary to every other federal appellate court in the United States, that the statutory exclusion found at Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), must be read broadly to exclude coverage of all contracts of employment. *See Craft*, 177 F.3d at 1094; *Adams*, 194 F.3d at 1070 (citing *Craft*). Further, in *Adams*, the Ninth Circuit expanded its holding in *Craft* by finding that the same arbitration agreement currently before this Court was a "contract of employment," for purposes of placing the agreement within the FAA Section One exclusion. *See Adams*, 194 F.3d at 1071 ("[T]he [arbitration] agreement was a condition precedent to [Adams's] employment, [and thus,] was an employment contract, rendering the FAA

inapplicable.").[2] *Id.* at 1072. In this case, as in the *Ingle* case on which a petition for writ of certiorari also is pending, the Ninth Circuit followed the views articulated in *Craft* and *Adams* regarding (1) the scope of the FAA Section One exclusion and (2) what constitutes a "contract of employment." The Ninth Circuit concluded that the FAA did not apply to the appeal before it, and dismissed the appeal for "lack of jurisdiction." See Appendix A.

The arbitration agreement at issue here arises out of Circuit City's implementation in March 1995 of an "Associate Issue Resolution Program" ("AIRP"). *See Ahmed*, 195 F.3d at 1131. Following implementation of the AIRP, prospective applicants are required, as part of the job application process, to execute a document entitled "Circuit City Dispute Resolution Agreement" ("DRA") by which they agree to resolve "any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator." (ER 11, 16.). Prospective applicants for employment with Circuit City must agree to the terms of the DRA in order to have an application for employment considered. *Id.* A prospective applicant may withdraw his or her agreement to arbitrate within three days of execution by

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[2] The holding in *Adams* appears to be directly at odds with the Ninth Circuit's ruling in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378), the companion case to *Adams* in which a writ of certiorari also has been sought. In *Ahmed*, the Ninth Circuit found the arbitration agreement at issue to be an "employment contract" even though the court expressly found that participation in the arbitration program was "voluntary," and expressly held that participation in the arbitration program was "*not* a condition precedent to employment." *Id.* at 1133 (emphasis added).

withdrawing his or her application for employment. (ER 16-17.)

The DRA is a separate, stand-alone agreement between the prospective applicant and Circuit City, entered into as part of the application process. The obligation to arbitrate exists independently of the employment relationship and applies before, during and after employment. (ER 16.) The arbitration agreement specifically disclaims any status as an employment contract. (*Id.*) ("I understand that neither this agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me.").[3]

REASONS FOR GRANTING REVIEW

I. THE NINTH CIRCUIT'S DISMISSAL ON JURISDICTIONAL GROUNDS WAS BASED ON A BROAD READING OF THE FAA SECTION ONE EXCLUSION WHICH CREATES AN INTOLERABLE CONFLICT AMONG THE LOWER COURTS.

In this case, by holding that it lacked federal appellate jurisdiction over Circuit City's appeal, the Ninth Circuit has extended the error made in its previous decision in *Adams*, 194 F.3d at 1071-72, a case this Court already has agreed to review. There, the Ninth Circuit held that the exclusion found in Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), must be read broadly to encompass all "labor or employment contracts." *Adams*, 194 F.3d at 1072 (citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999)).

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[3] The Dispute Resolution Rules and Procedures contain the rules and procedures governing arbitrations conducted pursuant to the parties' agreement to arbitrate. (ER 22.)

This interpretation of the FAA Section One exclusion directly conflicts with every other United States Court of Appeals.[4] The Ninth Circuit has applied its interpretation here to dismiss an appeal filed in part pursuant to Section 16 of the FAA, 9 U.S.C. § 16 (1994), based on its conclusion that the FAA is inapplicable to the arbitration agreement at issue here. The common basis for the decisions in this case, *Craft*, and *Adams* also conflicts directly with the decision of a state court of last resort within the geographic area covered by the Ninth Circuit. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996) ("[W]e believe that the narrow interpretation of the section 1 exclusion is correct . . . ."). Finally, the Ninth Circuit's decisions in this case, *Craft*, *Adams*, *Ahmed* and *Ingle*, raise an important issue not settled by the Supreme Court, which expressly has been reserved by this Court,[5] and currently is the subject of a writ of certiorari granted by this Court.

In the Ninth Circuit's view, no agreement to arbitrate disputes entered into by an employer and an employee may be enforced pursuant to the FAA. *See Adams*, 194 F.3d at 1070. Further, following that analysis, no appeal may be maintained before the Ninth Circuit pursuant to the jurisdiction granted by Section 16 of the FAA. See Appendix A.

This extreme position manifests itself in many ways. In *Adams* and its companion case, *Ahmed*, the Ninth Circuit found

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[4] The Federal Circuit, because of its specialized and limited jurisdiction, has had no occasion to address this issue.

[5] This Court previously has reserved the question of the proper scope to be given to the FAA Section One exclusion. *See Gilmer*, 500 U.S. at 25 n.2 (1991) (Court "leave[s] for another day the issue raised by amici curiae" as to proper scope of the FAA Section One exclusion). This question was reserved over the dissent of Justice Stevens and Justice Marshall. *Id.* at 36. As in *Gilmer*, the arbitration program at issue here also is not part of a "contract of employment." *See infra* Section II.

as a matter of substantive law that the FAA did not apply to arbitration agreements between Circuit City and its Associates. As a result, the Ninth Circuit held that a federal district court lacked "federal authority" to compel arbitration pursuant to the FAA, and reversed the orders of the district courts compelling arbitration. *See Adams*, 194 F.3d at 1072; *Ahmed*, 195 F.3d at 1133. Here, as in the *Ingle* case, the same flawed analysis has a different, but equally significant impact, removing the jurisdictional basis for Circuit City's appeal to the Ninth Circuit of a district court order denying Circuit City's motion to compel arbitration pursuant to the FAA. See Appendix A.

However, this broad reading of the FAA Section One exclusion by the Ninth Circuit directly conflicts with every other federal appellate court. Rather, every other United States Court of Appeals has found the FAA Section One exclusion to be narrow, applying only to employment contracts of seamen, railroad workers, and other employees actually engaged in the movement of goods in interstate commerce. *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive interpretation to the exclusionary language of [FAA] Section 1."); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir.) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels of commerce itself."), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this Section 1 exemption."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996)

("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers . . . ."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce."); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce."); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the Court) (narrow construction of FAA Section One exclusion "accords with the statute's text and history"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA excludes from the [FAA] only the employment contracts of workers engaged in the transportation of goods in commerce.").

Further, since the Ninth Circuit decided *Craft*, the Seventh Circuit has considered and expressly disagreed with *Craft*. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 363-64 (7th Cir.) ("We acknowledge that our finding of jurisdiction [under the FAA] is in disagreement with the Ninth Circuit, which recently held that all contracts of employment are

outside the scope of the FAA. However, other circuits which have addressed this issue have concluded, as we have, that such employment contracts are not excluded from the purview of the FAA.") (citations omitted), *cert. denied*, 120 S. Ct. 44 (1990).

Thus, the Ninth Circuit stands alone in its view that the FAA Section One exclusion reaches all contracts of employment. In contrast, the more logical view is that when drafting the FAA Section One exclusion, Congress had in mind specific transportation workers for whom special arbitration legislation already existed. In *Tenney Eng'g, Inc. v. United Elec. & Mach. Workers of Am.*, 207 F.2d 450 (3d Cir. 1953), the Third Circuit Court of Appeals analyzed the scope of the FAA Section One exclusion. Considering the text of the statute as well as the legislative history, the court concluded that when the FAA originally was drafted in 1925, Congress was aware that statutory arbitration mechanisms already existed for seamen (46 U.S.C. § 651)[6] and railroad employees (Railway Labor Act § 7, 45 U.S.C. § 157 (1994 & Supp. III 1997)). *See Tenney*, 207 F.2d at 452, nn.7-8; *see also Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995) (finding FAA Section One exclusion to have been added by Congress to overcome objections of Seamen's Union). In the Third Circuit's view, the addition of language by Congress regarding "any other class of worker engaged in foreign or interstate commerce" was intended:

> to include only those other classes of workers who are likewise engaged directly in commerce . . . . The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already

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[6] The seamen arbitration statute in effect when the FAA was drafted later was repealed, *see* Pub. L. 98-89, Aug. 26, 1983, leaving to seamen other statutory dispute resolution procedures. *See, e.g.*, 46 U.S.C. § 10302(b) (1994).

> existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

Tenney, 207 F.2d at 452-53.

As a result of the Ninth Circuit's solitary position, an intolerable conflict is presented. Specifically, employers within the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington now are precluded from relying on the FAA as a jurisdictional basis for appeal when a federal court declines to enforce arbitration agreements with employees who are not transportation workers. However, employers and employees in forty-one other states and Puerto Rico may obtain precisely that relief.

Only in the Ninth Circuit are employers denied the right to immediate federal appellate review of a lower court decision adverse to arbitration. This statutory right is consonant with the strong federal policy favoring arbitration. Specifically, when enacting the appeal provisions of the FAA, Congress recognized the inherent risk of irreparable injury to a party who, upon a court's denial of a petition to compel arbitration, must then proceed to litigate a lawsuit without the opportunity for immediate appellate review of that decision. In such cases, the entire benefit of the arbitration agreement is lost, rendering appellate reversal of a decision adverse to arbitration a hollow victory. Congress thus authorized *immediate* appeals of orders denying motions to compel arbitration brought pursuant to the FAA. *See* 9 U.S.C. § 16(a)(1) (1994). In *Stedor Enters., Ltd. v. Amtex, Inc.*, 947 F.2d 727 (4th Cir. 1991), the Fourth Circuit noted that the "broad purpose of Section 16 was to implement Congress' 'deliberate determination that appeal rules should reflect a strong policy favoring arbitration.' " *Id.* at 730 (quoting 15 Charles A. Wright, et al., *Federal Practice and Procedure* § 3914.34 at 412 (Supp. 1990)). In *Stedor*, the Fourth Circuit highlighted the concern that a party will be irreparably injured

if forced to litigate while appealing the denial of a motion to compel arbitration:

> [A]n order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration; refuses to compel arbitration; denies confirmation to or modifies, corrects or vacates an arbitral award; or grants, continues, or modifies an injunction against arbitration—is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. § 16(a)(1) and (2). *Thus, a party who believes that arbitration is required by an agreement between the parties need not suffer the expense and inconvenience of litigation before receiving appellate review of a district court judgment that arbitration was inappropriate.*

Id. (emphasis added). Here, by denying Circuit City's right to an immediate appeal of the denial of a petition to compel arbitration, the Ninth Circuit would require Circuit City and all employers to "suffer the expense and inconvenience of litigation before receiving appellate review" of the matter at issue. *Id.*

These conflicts present a predicament for large national employers like Circuit City, with operations both within and outside the geographic area covered by the Ninth Circuit. Such employers who use the same arbitration agreement for their entire workforce now are barred from seeking enforcement of arbitration agreements pursuant to the FAA in federal courts within the Ninth Circuit, while such relief is available outside the Ninth Circuit. Likewise, the right to immediate appellate review is lost within the Ninth Circuit. As a result, the Ninth Circuit's position creates an intolerable conflict affecting thousands of employers and many hundreds of thousands of employees.

This conflict is not simply hypothetical, but actually exists for the petitioner. Two other federal courts of appeals have

reviewed the same arbitration program under the FAA. In *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998), the Fourth Circuit recognized that "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Id.* at 377 (citing *Gilmer*, 500 U.S. at 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))).

Subsequently, in *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999), the Seventh Circuit Court of Appeals considered Circuit City's appeal of a district court's order denying a motion to compel arbitration under the arbitration agreement at issue here. *Id.* at 637. Directly contrary to the Ninth Circuit, the Seventh Circuit expressly found a jurisdictional basis for the appeal in Section 16 of the FAA. *Id.* at 635 ("[W]e find jurisdiction for this appeal under section 16(a)(1)(C) of the [FAA], which provides that an appeal may be taken from an order denying a motion to compel arbitration.") (citations omitted). It found no jurisdictional bar to considering the appeal before it. Neither the Fourth nor Seventh Circuits found the agreement to arbitrate to be an "employment contract."

Finally, the Ninth Circuit's view of the scope of the FAA Section One exclusion also directly conflicts with that of the Supreme Court of Hawaii, located within the Ninth Circuit's geographic area. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996) ("[W]e believe that the narrow interpretation of the section 1 exclusion is correct . . . ."). Thus, employers and employees in Hawaii, including Circuit City, seeking enforcement of arbitration agreements under the FAA are faced with directly conflicting interpretations of the FAA, depending on whether they seek to compel arbitration in state or federal court. A definitive ruling by this Court as to the proper scope of the FAA Section One exclusion will remove these intolerable conflicts.

II. THE NINTH CIRCUIT'S DISMISSAL ON JURISDICTIONAL GROUNDS WAS BASED ON A BROAD VIEW OF WHAT CONSTITUTES AN "EMPLOYMENT CONTRACT" FOR PURPOSES OF THE FAA SECTION ONE EXCLUSION WHICH CREATES AN INTOLERABLE CONFLICT WITH SUPREME COURT AUTHORITY.

Review of the Ninth Circuit's decision is warranted for a second and separate reason. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expressly declined to address the issue of the appropriate scope of the FAA Section One exclusion because the arbitration agreement presented there was contained in a securities industry U-4 registration form ("Form U-4"), required as a condition precedent to working as a broker in the securities industry, rather than in an employment contract. *Id.* at 25 n.2. As a result, the clear direction from this Court is that, regardless of the "broad" or "narrow" scope of the FAA Section One exclusion, arbitration agreements which are not "contracts of employment" are not excluded from coverage by the FAA. *Id.* Thus, if the arbitration agreement at issue here is not a "contract of employment," the FAA Section One exclusion would not preclude application of the FAA, which would in turn leave intact the vehicle for immediate appellate review found in Section 16 of the statute. *See* 9 U.S.C. § 16 (1994).

Like the arbitration agreement in a securities registration application in *Gilmer*, 500 U.S. at 25 n.2, this arbitration agreement is not contained in a contract of employment, and accordingly, the exclusionary language of FAA Section One cannot apply. Specifically, in *Gilmer*, prospective licensees under the Form U-4 were required to agree to arbitrate employment-related legal claims against their employer as a condition precedent to employment. *Id.* at 25 n.2. Likewise, prospective applicants for employment with Circuit City must agree to arbitrate employment-related legal disputes in order to

have their applications considered by Circuit City. (ER 16.) Both agreements establish the obligation to arbitrate but have no further impact on setting the terms and conditions of employment. (*Id.*) Neither agreement sets the wages, hours, working conditions, period of employment or various other terms normally found in an employment contract. (*Id.*) In fact, the arbitration agreement executed by Al-Safin specifically disclaims any status as an employment contract. (*Id.*) ("I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me. . . . If Circuit City does accept my application for employment and I become employed at Circuit City, this Agreement in no way alters the 'at-will' status of my employment."). By its own terms, then, the arbitration agreement is not an employment contract. Rather, like the Form U-4, the arbitration agreement is a separate, stand-alone agreement by which Al-Safin agreed to arbitrate any and all employment-related legal disputes in exchange for Circuit City's agreement to consider his application for employment. Furthermore, the arbitration agreement is not a "contract of employment" because it applies not only to applicants who ultimately are hired by Circuit City, but also to unsuccessful applicants, who never become employed by the Company. *See Johnson v. Circuit City*, 148 F.3d 373, 378 (4th Cir. 1998) (finding adequate consideration for the arbitration agreement even though applicant was never hired by Circuit City).

Thus, even if the Ninth Circuit is correct (and every other federal court of appeals is wrong) in its broad reading of the scope of the FAA Section One exclusion, the decision that Al-Safin's agreement to arbitrate falls within the FAA Section One exclusion as a "contract[] of employment," still conflicts with this Court's opinion in *Gilmer*, *supra*, and with the "liberal federal policy favoring arbitration agreements" reflected in the

FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

III. THE NINTH CIRCUIT'S DECISION IS AN ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY.

The Ninth Circuit's erroneous interpretations of (1) the scope of the FAA Section One exclusion, and (2) what constitutes a "contract of employment," have a serious and immediate impact on thousands of employers and employees. For example, Circuit City is a national company employing approximately 60,000 Associates. The Company has approximately 10,000 Associates employed in the nine states within the Ninth Circuit. If the Ninth Circuit's decision is permitted to stand, Circuit City will be in the untenable position of being permitted to move to compel arbitration pursuant to the FAA in every court except those under the authority of the Ninth Circuit. Circuit City also will be denied only in the Ninth Circuit its statutory right to immediate appellate review of a decision adverse to arbitration.

This serious and immediate impact is not limited to Circuit City, but is shared by all businesses that employ persons both within and outside the geographic scope of the Ninth Circuit. The Ninth Circuit's erroneous rulings present for them the same intolerable conflict.

Moreover, employers who operate solely within the nine states covered by the Ninth Circuit now are deprived completely of their federal statutory right to seek enforcement in federal court of agreements to arbitrate employer-employee disputes, including the right to immediate appellate review of any decision adverse to arbitration, which rights expressly are granted to them by Congress when enacting the FAA, *see* 9 U.S.C. §§ 3, 4, 16 (1994), and recognized by this Court. *See Gilmer*, 500 U.S. at 24-25. By contrast, their counterparts in forty-one other states may pursue this relief, including immediate federal appellate court review of orders denying

motions to compel arbitration, which specifically is provided by the FAA. 9 U.S.C. § 16 (1994).

Lastly, the Ninth Circuit's view is that any agreement requiring arbitration of disputes between employers and employees is a "contract of employment" excluded from coverage by the FAA. In contrast, employers and employees outside the Ninth Circuit with such agreements are not deprived of the statutory protections and procedures available in the FAA, including immediate appellate review. *Id.*

By granting certiorari on the issues presented, this Court can remove the conflict currently existing and ensure a nationally uniform interpretation of the FAA's Section One exclusion.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. As an alternative to granting this Petition, Circuit City respectfully requests summary reversal of the Ninth Circuit's decision in this case.

Respectfully submitted,

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September 18, 2000

APPENDICES

APPENDIX A

[Entered: Feb. 22, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99 1953P

MOHAMMED AL-SAFIN,
Plaintiff,

v.

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Defendant.

ORDER ON MOTION TO COMPEL ARBITRATION AND DISMISS LAWSUIT

Defendant has filed a motion to compel arbitration and dismiss this lawsuit. Having considered the papers and pleadings filed herein, the Court DENIES Defendant's motion for the reasons set forth below. The Court finds, based on its review of the pleadings and authorities, that oral argument is not necessary to rule on this motion.

I. Background

Plaintiff, a Jordanian Muslim, worked as a computer sales counselor for defendant Circuit City from June 1997 until his termination in November of 1998. Plaintiff alleges that his termination was in retaliation for complaining of discriminatory treatment in the workplace in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Mr. Al-Safin's

complaint also alleges violations of 42 U.S.C. §1981 and the Washington Law Against Discrimination ("WLAD"), RCW 49.60.

At the time that he applied for employment with Defendant, Mr. Al-Safin was required to sign a Dispute Resolution Agreement ("DRA"). Defendant admits that, had he not signed the DRA, Plaintiff would not have been hired.

The agreement constitutes a waiver of the employee's right to litigate certain issues before the appropriate judicial forum; all areas covered by the agreement must be submitted to arbitration. Among those areas are claims of employment discrimination pursuant to Title VII. The statute of limitations for bringing the claim to arbitration is one year (as opposed to the three year statute for judicially-litigated suits). The DRA also contains limitations on awards of back pay, future pay and punitive damages, and a stipulation that any lawsuit filed concerning a dispute covered by the agreement will be dismissed in favor of the arbitration procedure.

In his pleadings Plaintiff alleges (and Defendant does not controvert) that he was directed to sign the DRA without adequate time to read it; that the significance of the agreement was never discussed with nor explained to him; that he was never provided with a copy of the agreement; and that he was never provided with a copy of the Dispute Resolution Rules and Procedures (as the DRA requires).

II. Analysis

In support of the motion, Defendant cites the "strong federal public policy favoring arbitration" as embodied in cases such as *Gilmer v. Interstate/Lane Corp.*, 500 U.S. 20 (1991) and *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir.), *cert. denied*, 116 S.Ct. 61 (1996), and in legislation such as the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 et seq.

The reliance on *Gilmer*, *Lai* and the FAA is misplaced. *Gilmer* analyzed the relation of the FAA to a federal age discrimination statute which is not the basis of this lawsuit. More on point is *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.) *cert. denied*, 119 S.Ct. 445 (1998) which held squarely that the Civil Rights Act of 1991 prohibits requiring employees to waive their rights to litigate Title VII claims in court as a condition of employment.

Circuit City's attempt to distinguish *Duffield* does not survive a close reading of the case. The prohibition in *Duffield* is addressed to "compulsory" arbitration agreements as a condition of employment, "compulsory" defined as that circumstance "when individuals must sign an agreement waiving their rights to litigate future claims in a judicial forum in order to obtain employment with, or continue to work for, an employer." *Id.* at 1187. Defendant's argument that the holding is confined to industry-wide practices is not supported by the language of the opinion, which merely found the pervasive nature of the DRA at issue to be "*especially* violative of Congress' limitations." (emphasis supplied) *Id.* at 1198.

While the opinion in *Lai* does contain the observation that "[I]ndividuals may contractually agree to arbitrate employment disputes," 42 F.3d at 1303, the opinion actually upheld the employee's right to judicial resolution of her employment discrimination claims in the face of a contrary arbitration agreement. At the heart of the *Lai* opinion is the requirement that an employer must not merely demonstrate that the employee signed the agreement, but that the waiver of the right to sue was made *knowingly*.

The plaintiff in *Lai*, much like the plaintiff here, alleged that she was never told that what she was being asked to sign was a mandatory arbitration agreement, that she was never notified subsequently of such a provision in her employment contract and that she was never provided with any manual or other

documentation which might have alerted her to the nature of the agreement. In upholding plaintiff's position, the court stated:

> We agree with appellants that Congress intended there be at least a knowing agreement to arbitrating employment disputes before an employee may be deemed to have waived... Title VII and related statutes. *Id.* at 1304.

Mr. Al-Safin's allegations on the issue of his knowledge of the nature of the DRA, uncontroverted by Defendant here, must be weighed heavily in considering whether he has effectively waived his right to litigate his claims in court.

The FAA itself exempts "employment contracts" from its application. While there is not uniformity of opinion among the federal circuits about whether an arbitration agreement such as the one at issue here is an "employment contract," the Ninth Circuit has unequivocally adopted the position that they are. In two cases involving Circuit City and their DRA, the Court of Appeals has reversed decisions compelling arbitration of employment claims on the basis of a DRA that was a condition of employment. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) and *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999).

The Court is unpersuaded by Defendant's attempts to distinguish these precedents. Certainly the cases have not been overruled, Circuit City's intention to seek review with the U.S. Supreme Court notwithstanding. The argument that the DRA (which is a condition of employment for any potential applicant and which purports to determine in what fashion employment disputes may be resolved) is something other than an "employment contract" is not one which appeals to logic or common sense.

Circuit City cites two cases from this district in support of their position. Neither are compelling precedent. *Jessburger v. Circuit City Stores West Coast*, Case No. C99-5173 RJB,

involved a duress argument by the employee and none of the grounds cited by plaintiff here. In any event, it was decided prior to *Ahmed* and *Adams*. The assertion that the DRA was "upheld" in *Ding and Abadilla v. Circuit City Stores, Inc.*, Case No. C95-1226D is something of an overstatement—plaintiff in that case conceded the obligation to arbitrate and this Court must take note of the fact that the case arose long before the precedents involved in this analysis were established.

Title VII also insulates Plaintiff's state anti-discrimination claims from the effects of the DRA. As noted in *Lai*, "parallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme." 42 F.3d at 1303, n. 1. To the extent that the Uniform Arbitration Act of Virginia (the DRA's "law of choice") is *contra*, the holding of *Renteria v. Prudential Insurance Co.*, 113 F.3d 1104 (9th Cir. 1997), controls: "State law cannot weaken the protections this court has concluded Congress intended to create under Title VII." *Id.* at 1108.

In a footnote in their reply brief, Circuit City raises the argument that, even if this Court is disposed to follow *Duffield*, their motion must be granted on the non-Title VII claims; i.e., the remaining state (WLAD) and federal (§1981) claims must be compelled into arbitration. The proceeding paragraph addresses that argument as regards Plaintiff's state law claims. Concerning the §1981 causes of action, we note that both the *Gilmer* and *Duffield* courts engaged in extensive analysis of both the statutory language and legislative history of the Age Discrimination in Employment Act and Title VII, respectively. Defendant may wish to bring a separate motion to address the intersection of §1981, the FAA and the case law, but a cursory mention in a footnote does not provide sufficient briefing to form a basis for a ruling.

III. Conclusion

This Court is not persuaded that the Dispute Resolution Agreement precludes Plaintiff from bringing this lawsuit. For the reasons noted above, Defendant's motion is hereby DENIED.

The clerk is directed to send copies of this order to all counsel of record.

DATED: February 22, 2000

/s/ Marsha J. Pechman
United States District Judge

APPENDIX B

[Filed June 29, 2000]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 00-35241

MOHAMMED AL-SAFIN,
Plaintiff-Appellee,

v.

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Defendant-Appellant,

ORDER

Before: FERGUSON and HAWKINS, Circuit Judges

Appellant's motion to stay proceedings in the district court pending appeal is denied.

A review of the record suggests that this court may lack jurisdiction over the appeal because the order from this appeal is taken denies a motion to compel arbitration based on a provision in what appears to be an employment contract. Because this court has held that such contracts are not subject to the Federal Arbitration Act, that statute's interlocutory appeal provision does not appear to be applicable here and no other basis for appellate jurisdiction appears to exist. *See Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam) (dismissing appeal on this basis).

Accordingly, within 14 days after entry of this order, appellant shall move for voluntary dismissal of the appeal or

show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, appellee may respond within 10 days after service of appellant's memorandum.

If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing is suspended pending further order of the court.

APPENDIX C

[Filed August 11, 2000]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 00-35241

MOHAMMED AL-SAFIN,
Plaintiff-Appellee,

v.

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Defendant-Appellant,

ORDER

Before: WALLACE, SCHROEDER and THOMAS, Circuit Judges

The court has received and reviewed the responses to the June 29, 2000 order to show cause. Because the order from which this appeal is taken denies a motion to compel arbitration based on a provision in an employment contract that is not subject to the Federal Arbitration Act, that statute's interlocutory appeal provision is not applicable here. *See Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999) (per curiam), *petition for cert. granted*, 120 S. Ct. 2004 (2000); *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam). Because no other basis for appellate jurisdiction exists, this appeal is dismissed and all pending motions are denied as moot.

DISMISSED.